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NO. 91-8685

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

TERRY LYNN STINSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S SUPPLEMENTAL REPLY
TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether possession of a firearm by a felon is a "crime of violence," as that term is used in the Career Offender provisions of the Federal Sentencing Guidelines, §§4B1.1 and 4B1.2?

PETITIONER STINSON'S SUPPLEMENTAL REPLY
TO GOVERNMENT'S BRIEF IN OPPOSITION

In its reply brief in opposition to Stinson's petition for certiorari, the Government apparently misstates the effect of the Eleventh Circuit's holding in United States v. Stinson, 957 F.2d 813 (11th Cir. 1992), [Stinson II]. At page eleven of its brief in opposition the Government argues:

"Nonetheless, the only cases affected by that disagreement [the disagreement between the circuits whether the November 1, 1991 amendment to application note 2 to the commentary to Sentencing Guideline 4B1.2, which states that possession of a firearm by a felon is not a crime of violence, is to be applied "retroactively" to sentencings that occurred prior to the effective date of the amendment] are those antedating the November 1, 1991, amendment to Section 4B1.2. The disagreement among the courts as to the proper disposition of that closed set of cases does not require resolution by this Court."

This implies that, in any event, all circuits, including the Eleventh Circuit, will apply the new commentary to sentencings occurring after the effective date of the amendment to the commentary, that is, after November 1, 1991. This simply is not correct. The Eleventh Circuit made it quite plain in its holding in Stinson II that it will continue to refuse to follow the Sentencing Commission's amendments to the commentary unless and until Congress approves an amendment to the Guideline itself.¹ The Eleventh Circuit explained its

¹ There have not yet been any reported decisions out of the Eleventh Circuit involving post-amendment sentencings. However, it is counsel's experience that Stinson II is in fact being applied to post November 1, 1991 sentencings, that is, defendants with a count of conviction as a felon in possession

holding as follows:

"The Commission's amendment did not alter the actual text of section 4B1.2; instead, it merely changed the commentary When we are faced with the question of whether we should reverse our decision and also ignore precedent from other circuits because of a change in guideline commentary, it is crucial to examine closely the appropriate weight to be afforded to the commentary This new commentary coming after we had construed the guidelines, raises the question of what effect should be given a post hoc change in the commentary the commentary is never officially passed upon by Congress Congress is only charged with reviewing amendments to the guidelines If there is no change to a particular guideline, but the Commission alters that section's commentary, there is no evidence Congress reviews it We note, however, that there is no mention [in Mistretta] that Congress has the power to amend directly the guidelines' commentary which we see as uniquely the Commission's work product We doubt the Commission's amendment to section 4B1.2's commentary can nullify the precedent of the circuit courts We decline to be bound by the change in section 4B1.2's commentary until Congress amends section 4B1.2' language to exclude specifically the possession of a firearm by a felon as a 'crime of violence.'"

Under the holding of Stinson II, the Eleventh Circuit will continue to apply the career offender enhancements to felons in possession both for defendants sentenced before and after the November 1, 1991 effective date of the new commentary.²

are currently being sentenced as career offenders in the Middle District of Florida in reliance on Stinson II, and that is the policy of the United States Probation Office for this District.

² It may not only be the Eleventh Circuit that will apply the amendment in this manner. As the Government reads the post-amendment decisions from the Fourth, Fifth and Ninth Circuits, United States v. Johnson, 953 F.2d 110 (4th Cir. 1992), United States v. Samuels, No. 91-5429 (4th Cir. June 22, 1992), United States v. Fitzhugh, 954 F.2d 253 (5th Cir. 1992) and United States v. Sahakian, 965 F.2d 740 (9th Cir. 1992), those circuits will continue to apply the career

Thus, it is not a "closed set of cases," but an unbounded set of cases, of significant impact as to each individual so sentenced. Therefore, the Government's policy argument against this Court granting certiorari to Stinson is based on a false premise.

In any event, the Government's misunderstanding of the holding in Stinson II relates only to the Government's policy argument against this Court granting certiorari. The Government's legal argument against Stinson rests on only one position: that the amendment to the commentary to guideline section 4B1.2 is not retroactive and hence does not apply to Stinson's case, because Stinson was sentenced before the effective date of the amendment.³

The Government, at pages nine and ten of the Brief of the United States in Opposition, argues:

offender enhancement to felons in possession, notwithstanding the commentary explaining that the charge of felon in possession is not a crime of violence for career offender purposes, if "aggravating circumstances are alleged in the count charging that offense." [Brief of the United States in Opposition at p. 10.] Also, the Sixth Circuit, in United States v. Beckley, No. 91-6177 (6th Cir. July 22, 1992), seems to hold that it will look to the circumstances of the offense in determining whether possession of a firearm by a felon is a crime of violence, irrespective of the new commentary.

³ The government in effect concedes that if the amendment in question were retroactive, then Stinson should have been sentenced in accordance with it. For example, at page nine of the Government's Brief in Opposition, the Government states: "To be sure, petitioner's offense would not have been a 'crime of violence' under the commentary to Sentencing Guidelines § 4B1.2 that became effective on November 1, 1991, after petitioner was sentenced and his sentence was affirmed on appeal." At page ten of its brief, the Government accordingly concludes: "[T]he question in this case is relevant only to cases in which sentence was imposed under Sentencing Guidelines § 4B1.2 before November 1, 1991 . . ."

"Petitioner argues that the 1991 commentary is relevant to his case because it indicates how the Sentencing Commission intended the pre-1991 version of Sentencing Guidelines § 4B1.2 to be interpreted. That assertion is incorrect and in any event does not merit further review . . . [T]he November 1, 1991, amendment to the commentary to Section 4B1.2 is properly viewed as effecting a substantive change in the Guidelines, rather than as merely making explicit a principle that the Guidelines had previously embraced. Although the Sentencing Commission referred to the pertinent changes as 'clarif[ying]' the meaning of Section 4B1.2, Guidelines App. C.254, amendment 433; see also 57 Fed. Reg. 20148, 20157 (May 11, 1992), the Commission's characterization of a change in the commentary does not require a court to give retroactive effect to the change if the change is made after the defendant's sentencing. [citing authority]."

If there was any force to this argument, it has been lost by the recent action taken by the United States Sentencing Commission. On August 26, 1992, the Sentencing Commission adopted an amendment to Guideline §1B1.10 (Retroactivity of Amended Guideline Range), expressly making amendment 433 (the amendment to application note two to the commentary to §4B1.2) retroactive. A copy of the amendment is set forth in full in the appendix hereto.

Because the Government rests its opposition to Stinson's petition on the lack of retroactivity of the amended commentary, and given that the Sentencing Commission has now addressed that issue and expressed itself to the contrary, it would seem that the government has no legal basis for opposing Stinson's petition.⁴

⁴ Apparently because the government rested its entire opposition on the asserted lack of retroactivity of the commentary, the Government chose to not address Stinson's other arguments, for example, Stinson's challenge to the

In 1764, Cesare Beccaria in Of Crimes and Punishments set forth the maxim that has guided courts for two centuries since:

nulla poena sine lege⁵

Today, Terry Lynn Stinson and untold other American criminal defendants are imprisoned under sentences that are illegal. The Eleventh Circuit denied Stinson's petition for rehearing, and later separately denied his petition for rehearing en banc. This Court and this petition for certiorari is Stinson's last resort for justice.

Respectfully submitted,

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Eleventh Circuit's holding that possession of a firearm is "by its nature," irrespective of the underlying circumstances or conduct reflected in the charging instrument, a "crime of violence." Apparently the government's misreading of the holding in Stinson II led the Government to ignore Stinson's analysis of the impact on the guidelines of the Eleventh Circuit's holding, i.e., that new guideline §4B1.4 (Armed Career Criminal) will, under the Stinson II holding, never be applied in the Eleventh Circuit, nor will guideline §§2K2.1(a)(1) and (2) be applied. These arguments may continue to be of significance if this Court were otherwise to agree with the Eleventh Circuit that commentary cannot override circuit court authority, although such a position would not be in harmony with this Court's reasoning in Williams v. United States, __ U.S. __, 112 S.Ct. 1112, 117 L.Ed.2d 341 (1992).

⁵ Of Crimes and Punishments, The Library of Liberal Arts, Translated by Henry Paolucci, 1963, p.19.

APPENDIX

A. Amendment to Guideline §1B1.10

§181.10. Retroactivity of Amended Guideline Range (Policy Statement)

- (a) Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the guidelines listed in subsection (d) below, a reduction in the defendant's term of imprisonment may be considered under 18 U.S.C. § 3582(c)(2). If none of the amendments listed in subsection (d) is applicable, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement.
- (b) In determining whether a reduction in sentence is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the sentence that it would have originally imposed had the guidelines, as amended, been in effect at that time.
- (c) *Provided*, that a reduction in a defendant's term of imprisonment may, in no event, exceed the number of months by which the maximum of the guideline range applicable to the defendant (from Chapter Five, Part A) has been lowered.
- (d) Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 379, ~~and 380, 433, 448, and 461.~~

* * *

Reason for Amendment: This amendment expands the listing in subsection (d) to implement the directive in 28 U.S.C. § 994(u) in respect to the guideline amendments effective November 1, 1992. See attached memorandum.